

SPORTS BETTING IN NEW MEXICO INDIAN COUNTRY

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OVERVIEW

- I. Background on PASPA and *Murphy v NCAA*

- II. Relationship between IGRA, Tribal-State Compacts, and New Mexico Law

PART I – PASPA AND MURPHY V. NCAA

- The Professional and Amateur Sports Protection Act (PASPA) was enacted in 1992 to prohibit gambling on professional and amateur sports within the United States. 28 USC 3701 *et seq.*
- Congress adopted a prohibition mechanism in which states were directed not to “sponsor, operate, advertise, promote, license, or authorize” betting on competitive sporting events. 28 USC 3702(1).
- PASPA was not a federal criminal law that prohibited gambling, it simply prohibited that states from authorizing gambling.

WHAT ABOUT PASPA EXCEPTIONS?

- Because of existing sports gambling activity in Nevada and limited games in three other states, PASPA “grandfathered” those jurisdictions into the law. 28 USC 3704(a)(1-2).
- Thus, sports betting in nearly all of the United States, including Indian Country, was prohibited by PASPA.
- Another notable “exception” to PASPA related to “daily fantasy sports” online gambling.
 - DFS is NOT considered to be “sports betting” as there is an express exemption under the statute for fantasy leagues under the Unlawful Internet Gambling Enforcement Act.
 - E.g. DraftKings, FanDuel

MURPHY V. NCAA

- New Jersey amended its constitution in 2011 and enacted legislation in 2012 to authorize sports betting and was immediately challenged by the NCAA.
- The law was further amended in 2014 to set up the current case, which focused on whether Congress had “commandeered” the states by prohibiting the exercise of state sovereign actions in violation of U.S. Constitution.
- On May 14, 2018, the U.S. Supreme Court struck down and invalidated PASPA in its entirety.
 - The court held that Congress had violated the “anticommandeering” principle of Article I and the 10th Amendment of the Constitution.

EFFECT OF PASPA INVALIDATION

- After the decision in *Murphy v NCAA*, there is no *federal* law prohibiting sports betting within the states.
- Consequentially, New Jersey and several other states are moving forward with setting up sports betting enterprises
- Federal Wire Act remains obstacle to interstate wagering

What is the effect of PASPA invalidation on the Indian Gaming Regulatory Act or state law effecting Indian gaming?

What does it mean for Indian Country and the \$32 billion Indian gaming industry?

PART II –SPORTS BETTING IN NEW MEXICO: FEDERAL AND STATE LAW

- What is the current state of the law in New Mexico regarding sports betting?
- Gaming in Indian Country in New Mexico is subject to –
 - (i) the Indian Gaming Regulatory Act, 25 USC 2701 et seq. and
 - (ii) relevant provisions of New Mexico law regulating gambling.
- For Class II gaming defined under IGRA, a tribal government may self-regulate gaming subject to IGRA compliance.
- For Class III gaming, IGRA requires a tribal-state compact or federal administrative procedures to regulate gaming.

WHAT CLASS IS SPORTS BETTING UNDER IGRA?

- **25 USC § 2703 --**

(8) The term “class III gaming” means all forms of gaming that are not class I gaming or class II gaming.

- **25 CFR 502.4 (IGRA regulations) --**

- Class III gaming means all forms of gaming that are not class I gaming or class II gaming, including but not limited to: ...

(c) Any sports betting and parimutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai; or

- **Conclusion:** Existing federal law under both IGRA and NIGC regulations defines sports betting as a Class III game

FURTHER IGRA CONSIDERATIONS

- **25 USC § 2710 Tribal gaming ordinances--**
 - (d) Class III gaming activities;
 - (1) Class III gaming activities shall be lawful on Indian lands only if such activities are—
 - (B) located in a State **that permits such gaming** for any purpose by any person, organization or entity, and
 - (C) **conducted in conformance with a Tribal-State compact** entered into by the Indian tribe and the State under paragraph (3) that is in effect.

NEW MEXICO LAW RELATING TO SPORTS BETTING

- The N.M. Gaming Control Act provides --

60-2E-4. Limited gaming activity permitted.

Gaming activity is permitted in New Mexico only if it is conducted in compliance with and pursuant to:

- A. the Gaming Control Act; or
- B. *a state or federal law other than the Gaming Control Act that expressly permits the activity or exempts it from the application of the state criminal law, or both.*

NEW MEXICO LAW RELATING TO SPORTS BETTING

- On the basis of New Mexico statutory law, sports betting is generally considered to be prohibited within the state.
- However, **60-2E-4** provides that “Gaming activity is permitted in New Mexico” if it is conducted in compliance with and pursuant to:
 - A. the Gaming Control Act; or
 - B. a state or ***federal law other than the Gaming Control Act that expressly permits the activity*** or exempts it from the application of the state criminal law, or both.
- IGRA is a “federal law other than the Gaming Control Act that expressly permits” class III gaming.

NEW MEXICO LAW RELATING TO SPORTS BETTING

- Recall that IGRA regulations provide that "sports betting" is defined as a Class III game –

25 CFR 502.4 (IGRA regulations) --

- Class III gaming means all forms of gaming that are not class I gaming or class II gaming, including but not limited to: ...

(c) Any sports betting and parimutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai; or

- Accordingly, IGRA appears to authorize sports betting on Indian lands as a matter of federal law provided that it is regulated like a Class III game, e.g. pursuant to compact

NEW MEXICO INDIAN GAMING COMPACTS

- The 2015 Tribal State Gaming Compacts provide --

SECTION I. Purpose and Objectives.

The purpose and objectives of the State and the Tribe in making this Compact are as follows:

...

C. To provide for the regulation of Class III Gaming on Indian Lands within the State of New Mexico as required by the IGRA;

...

NEW MEXICO INDIAN GAMING COMPACTS

- The 2015 Tribal-State Gaming Compacts further provide --

SECTION 2. Definitions.

C. "Class III Gaming" means all forms of gaming as defined in 25 U.S.C. § 2703(8), and 25 C.F.R. § 502.4.

SECTION 3. Authorized Class III Gaming.

A. Permitted Class III Gaming. The Tribe may conduct, only on Indian Lands, subject to all of the terms and conditions of this Compact, ***any or all forms*** of Class III Gaming.

NEW MEXICO INDIAN GAMING COMPACTS

- SECTION II. Revenue Sharing.

A. Consideration. The Tribe shall pay to the State a portion of its Class III Gaming revenues identified in and under procedures of this Section, in return **for which the State agrees that the Tribe has the exclusive right within the State to conduct all types of Class III Gaming described in this Compact, with the sole exception of the use of Gaming Machines**, which the State may permit on a limited basis for racetracks and for veterans' and fraternal organizations as such organizations are described in NMSA 1978, § 60-2E-3(GG), as amended through 2014.

NEW MEXICO INDIAN GAMING COMPACTS

- Under the 2015 Tribal-State Compacts, revenue share is tied to Net Win from the Tribe's class III gaming machines

- SECTION II. Revenue Sharing.
 - C. Calculation of Payment Amounts.
 - I. "Adjusted Net Win" means the combined Net Win from all Class III Gaming Machines in the Gaming Facilities on the Tribe's Indian Lands, with the following adjustments:
 - ...
 - 2. The Tribe shall pay the State a percentage of its Adjusted Net Win, determined in accordance with this chart:

NEW MEXICO INDIAN GAMING COMPACTS

- The Tribe's obligations to make revenue sharing payments is subject to the limitations Section 11(D) under which the obligation is terminated in the event the State attempts to restrict Tribal gaming in the State.

- SECTION II. Revenue Sharing.

- D. Limitations.

- I. **The Tribe's obligation to make the payments** provided for in Paragraphs 8 and C of this Section shall apply and continue only so long as this Compact remains in effect; and provided that that obligation **shall terminate altogether in the event the State:**

- (a) **passes, amends, or repeals any law, or takes any other action, that would directly or indirectly attempt to restrict, or has the effect of restricting, the scope or extent of Indian gaming;**

NEW MEXICO INDIAN GAMING COMPACTS

- The obligation also terminates if the State allows the racinos to operate table games or violates the limited exclusivity agreed to in the Compact.
 - (c) **permits any licensed horse racetrack** to operate a larger number of Gaming Machines, or to operate any Gaming Machines for longer hours, than is set forth in Subsection (o)(2)(e), below, or to operate any Gaming Machines outside of its licensed premises, **or to operate any Table Game; or**
 - (d) **licenses, permits or otherwise allows any non-Indian person or entity to engage in any other form of Class III gaming** other than a state-sponsored lottery, parimutuel betting on horse racing and bicycle racing, operation of Gaming Machines, and limited fundraising by non-profit organizations, as set forth in Subsection (o)(2), below.

NEW MEXICO INDIAN GAMING COMPACTS

ASSESSMENTS –

- Tribal-state gaming compacts expressly authorize “any and all forms” of Class III games as defined by IGRA regulations, which define “sports betting” as a Class III game.
- It appears that New Mexico tribal governments with a tribal-state compact in effect are authorized to offer sports betting.
- Moreover, if the State attempts to prevent tribes from engaging in sports betting or opens sports betting to non-tribal entities then the Tribes' obligations to make revenue share payments would be terminated.

QUESTIONS? COMMENTS?

Thank you for participating in our presentation on Sports Betting in New Mexico Indian Country!

If we can assist you in addressing the policy, legal, and political issues associated with implementing this exciting new initiative, please contact us.

Robert Odawi Porter
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ABOUT THE CAPITOL HILL POLICY GROUP

The Capitol Hill Policy Group is a bipartisan federal government relations firm that provides advice and advocacy on a wide range of issues before Congress, the White House and Executive branch agencies. Our principals have broad public affairs expertise with emphasis on Commerce and Economic Development, Indian Gaming, Natural Resources, Tax Policy, Telecommunications, Transportation and Infrastructure, and American Indian and Alaska Native Affairs. We work collaboratively with our clients to develop winning strategies and aggressively engage with government officials to pursue desired outcomes.

For more information, see www.capitolhillpolicygroup.com.

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Robert Odawi Porter is a former president of the Seneca Nation of Indians in Western New York. He has devoted his 25+ year professional career to advancing the rights of sovereign American Indian nations and tribes in the United States. A citizen of the Seneca Nation, Porter was raised in the Nation's Allegany Territory and earned his undergraduate degree from Syracuse University and his J.D. from Harvard Law School. He served two terms as Seneca chief legal counsel, as founding chairman of Seneca Holdings LLC, before being elected in 2010 as the Seneca Nation's 67th President. He has also served as a tenured law professor at the University of Kansas, University of Iowa, and Syracuse University. In 2013, he affiliated with Dentons US LLP in Washington, D.C. where he developed a government relations practice representing American Indian tribal governments and Alaska Native corporations.

In 2018, he formed the Capitol Hill Policy Group LLC.

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RICHARD J. FRIAS, ESQ.

Richard J. Frias is the former Legislative Director for the National Indian Gaming Association. After returning to New Mexico, Frias worked in house for the Pueblo of Pojoaque, serving first as Special Counsel and later as Chief Counsel to the Governor. Frias left Pojoaque in 2017 to start his own private practice focused on commercial transactions and Indian law. He joined the Capitol Hill Policy in 2018 to work on public policy issues relating to American Indian tribal governments in the southwestern United States. Frias is a Chiricahua Apache enrolled in the Chihene Nde Nation and has deep familial roots in New Mexico. He earned his law degree from UNM School of Law in 2011 and is licensed to practice in New Mexico.